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IN THE SUPREME COURT OF THE STATE OF NEVADA

CAROLYN STARK, an individual,
D/B/A NDOW WATCH KEEPING
THEM TRANSPARENT,

Appellant,

vs.

CARL LACKEY,

Respondent.

Supreme Court Case No.: 74449

District Court Case No.: CV17-00434

APPELLANT'S REPLY BRIEF

Appeal from the Second Judicial District Court's denial of Appellant's Anti-SLAPP Special Motion to Dismiss pursuant to NRS 41.660.



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District Court Case No.: CV17-00434

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5 3. If litigant is using a pseudonym, the litigant's true name: None.
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8 NRAP 26.1(a) 1

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**IV.
SUMMARY OF THE ARGUMENT**

This is a straightforward case where Respondent, Carl Lackey ("LACKEY") is attempting to hold Carolyn Stark ("STARK") liable for allegedly defamatory online comments made by other, unrelated third parties, solely due to her affiliation with the web page where the comments were posted. LACKEY did not sue the individuals who actually made or posted the comments, only STARK as an administrator of the page. As set forth more specifically herein, Respondent has failed to identify a single defamatory statement that was actually made by STARK or NDOW WATCH. Instead, Respondent continues to cite to and rely on countless statements made by unrelated third parties in an attempt to silence STARK's wildlife advocacy efforts.

**V.
ARGUMENT**

A. Standard of Review.

Appellant agrees that under the 2015 Amendments made to NRS 41.660(3)(b), the burden of proof for an Anti-SLAPP motion changed to reflect that Plaintiff must show "a prima facie case of a probability of prevailing on the merits of the claim." This change in the burden required, returns the applicable standard of review of by this Court to the de novo standard of review it used prior

1 to the 2013 amendment, because the evidence now again turns on whether plaintiff
2 has established a prima facie case as a matter of law.

3 **B. Preliminary matters regarding NRCP 12(b)(5) dismissal.**

4 Although LACKEY incorrectly alleges that STARK, “for the first time on
5 appeal [Appellant now contends] that the district court should have dismissed
6 Lackey’s claims for intentional infliction of emotional distress and conspiracy
7 based upon NRS 41.660 because dismissal is appropriate for any ‘cause of action
8 against a person arising from any act of that person in furtherance of the person’s
9 right of petition or free speech . . .” (Citations Omitted). Respondent’s Answering
10 Brief (“RAB”) at 3. LACKEY further alleges that this argument was never raised
11 below. *Id.* However, LACKEY’S representations are inaccurate.

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14 To the contrary, this argument was in fact raised before the District Court, in
15 both the moving papers as well as during oral arguments where STARK’s counsel
16 explicitly argued, “The gravamen of the Complaint is defamation is the first cause
17 of action. Negligence, emotional distress, civil conspiracy are all based on this
18 alleged defamation.” Vol. IV, JA 0234:24-JA 0235:3. See also, STARK’s Anti-
19 SLAPP Motion at Vol. I, JA 0036:28-JA 0037:4 asserting, (“The Nevada
20 Legislature has made clear with the passage of NRS 41.635 et. seq., and
21 subsequent amendments to same, and 47 U.S.C. § 230(c)(1), that such conduct
22 cannot form the basis of civil liability under any cause of action. As such, all of
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1 the claims for relief pled by the Plaintiff must be dismissed in accordance with
2 Nevada's Anti-SLAPP statutes.") [Emphasis Added].

3 As such, Respondent incorrectly represents that Appellant first raised these
4 issues on appeal. There is no question that Appellant raised these issues in the
5 District court. Therefore, these arguments are in fact appropriate for review by this
6 Court. See generally, *Delgado v. Am. Fam. Ins. Group*, 125 Nev. 564, 570, 217
7 P.3d 563, 567 (2009).

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9 **C. There are several misstatements of fact and inaccurate citations to
10 the record which require correction.**

11 Rather than cite to specific defamatory statements allegedly made by
12 STARK or NDOW WATCH, the Answering Brief herein repeatedly misrepresents
13 and mis-cites numerous facts that have no evidentiary support. As such, STARK is
14 compelled to clarify such probable misrepresentations to this Court and
15 respectfully points out and corrects the misstatements set forth in Respondent's
16 Answering Brief as follows:

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18 At page 4 of the Answering Brief, Respondent states, "Stark does business
19 as NDOW Watch Keeping Them Transparent ("NDOW Watch") and is its
20 voice" and cites to "1JA0012." [Emphasis Added]. However, the only statement
21 regarding STARK contained in Vol. I at JA 0012 is that "STARK, is an
22 individual, residing in Incline Village, Washoe County, State of Nevada and is
23

1 doing business as NDOW WATCH KEEPING THEM TRANSPARENT.” Vol I,
2 JA 0012:13-16. There is no allegation whatsoever that STARK is the voice of
3 NDOW WATCH. *Id.*

4 Respondent also misrepresents that,

5 “The FAC alleges and the posts show that Stark and others published
6 false and vicious comments about Lackey rising to the level of slander
7 per se by accusing him of criminal conduct and attacking his
8 livelihood, including allegations that he purportedly accepted
9 payments from hunters to disclose locations of bears, purportedly
accepted payments from hunters to place bears in hunt zones, and
allegedly conspired with others to commit illegal acts. 1JA0014-0018

10 [Emphasis Added] RAB, 5. A review of the FAC at pages 14-18 of the Joint
11 Appendix, as cited by Respondent in support of the above-referenced statement,
12 reveals there is not one single allegation set forth therein that STARK engaged in
13 any such conduct whatsoever. In fact, STARK’s name is not even mentioned in
14 any of those pages, not once. *Id.*

15 Respondent also refers to “Additional Evidence Presented” to the District
16 Court and proceeds to spend over two pages citing to comments made by people
17 other than STARK or NDOW WATCH. RAB, 14-16. Many of these posts are
18 either misrepresentations or mis-citations. For example, citing to Volume II, JA
19 0115-JA 0119 (which, for clarification, this in and of itself appears to be an error
20 because pages JA 0115-JA 0119 are in Vol. I, not II), Respondent lists out third-
21 party comments apparently made which incite violence or illegal conduct:
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1 “2JA0115-0119 (May 21, 2013 Post from LTWS ("we Must rid
2 Nevada of this monster who lives and is paid to kill bears"); July 4,
3 [year unknown] Post from Carolyn Ford ("Carl Lackey is disgrace!! I
4 wish someone would shoot him with a tranquilizer and let him see
5 how it feels!")); June 22, [year unknown] Post from Cindy Pollard
6 McAyeal ("I agree lackey needs to be darted in a trap and driven far
7 far away. hard release. bring in the dogs shot guns pellet bags rock
8 salt."). ..”¹

9 [Emphasis Added]. RAB, 14. While this is just a sampling, none of these
10 statements appears in Volume I, pages JA 0115-JA 0119 of the Joint Appendix.²
11 Further, not one of the statements set forth in the Answering Brief at pages 14-16
12 were made by STARK or NDOW WATCH. Not one. *Id.* In any event, the posts
13 that are on pages JA 0115-JA 0119 are not even posts on the NDOW WATCH
14 Facebook page, they are third-parties posts people made to other Facebook pages
15 over which STARK has absolutely no ownership or administrative control over
16 (and nor has any been alleged herein). See, Vol. I, JA 0115-JA 0119.

17 ¹ As equally problematic as failing to identify any defamatory statements actually
18 made by STARK and/or NDOW WATCH, is the fact that with respect to the third-
19 party statements apparently being used to distract from the lack of defamatory
20 statements actually attributable to STARK is the fact that many of the third-party
21 statements included herein as “additional evidence” are clearly time barred by the
22 Statute of Limitations. See, NRS §11.190(4)(c) (an action for libel or slander must
23 be brought within two (2) years). And again, these posts were not even made to the
24 NDOW WATCH page, they were made by third parties and posted to other
25 Facebook pages which STARK has no administrative controls, ownership or
26 management over. Vol. II, JA 0115-JA 0119.

27 ² In the interest of judicial economy, Appellant will not point out each and every
28 mis-citation set forth on pages 14-16 of the Answering Brief, but instead used the
29 first set of statements set forth above to demonstrate the inaccuracy of
30 Respondent’s factual representations and citations to the record.

1 Respondent also represents to this Court that “STARK made her own posts
2 in her name and in the name of NDOW Watch. See, e.g., 2JA0142 (‘strange that
3 NDOW has performed necropsies under less suspicious deaths but not on these
4 two’); 2JA0146 (‘They just can’t help themselves from misstating, embellishing
5 and distorting facts and information . . .’ and the post proceeds to discuss Lackey’s
6 specific lies); 2JA0155 (‘She became NDOW’s casualty when they executed
7 her...’); 2JA0155 (‘He has no soul.’).” RAB, 25.

9 With respect to the first statement, which is not contained anywhere in the
10 FAC, while it is contained at JA 0142 and was posted by NDOW WATCH,
11 nothing in that post contains anything defamatory, nor does it even mention
12 LACKEY. See, Vol. II, JA 0142. In fact, Respondent has offered absolutely
13 nothing in the record alleging anything in that post to be false or defamatory.
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15 However, as to the second statement, Vol. II, JA 0146 says absolutely
16 nothing about “misstating, embellishing and distorting facts and information” and
17 fails to say anything whatsoever about LACKEY. JA 0146 doesn’t even reference
18 lies or LACKEY once. See, Vol. II, JA 0146. Further and equally concerning, as to
19 the third statement, Vol. II, JA 0155 does not contain the quote alleged by
20 Respondent that “She became NDOW’s casualty when they executed her.” See,
21 Vol. II, JA 0155. As to the fourth and final statement, while Vol. II, JA 0155 does
22 contain the quote “He has no soul”; this is a quote by the page “NDOW Watch:
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1 Keeping them honest,” which has not been named, identified or discussed
2 anywhere in this action. [Emphasis Added]. *Id.* This action has asserted claims
3 with respect to “NDOW Watch: Keeping them Transparent.” [Emphasis Added].

4 Even though these misrepresentations and inaccurate citations to the record
5 may not squarely amount to fraud on this Court, sheer amount of these
6 discrepancies set forth in Respondent’s Answering Brief surely reflects gross
7 negligence with respect to misstatements Respondent has made herein. This list
8 of factual misrepresentations and inaccurate citations to the record is certainly not
9 all-inclusive; however, addressing line by line every single example of such
10 delinquencies would take away from STARK’s substantive arguments illustrating
11 the strength and merits of this Appeal. As such, with respect to any statements or
12 comments specifically identified as being made by or attributable to NDOW
13 WATCH and/or STARK herein, Appellant respectfully urges this Court to refer to
14 the actual record for verification as Appellant is confident this Court will be unable
15 to find or substantiate any such specific statements.

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18 **D. The District Court erred in holding STARK liable for statements**
19 **authored and posted by unrelated third-parties.**

20 Again, STARK did not author any of the specific comments raised by
21 LACKEY in his FAC. Vol. I, JA 0027:14-16; Vol. IV, JA 0233:18-22. All of
22 LACKEY’s asserted claims against STARK appear to be nothing more than an
23

1 attempt to punish her for not removing or policing statements of third-parties,
2 which directly arise from the exercise of STARK's free speech rights to publish
3 others' speech on NDOW WATCH's public Facebook page. [Emphasis Added].
4 See, *Cruz v. Van Sickle*, 452 S.W.3d 503, 517-18 (Tex. App.—Dallas 2014),
5 (Texas Anti-SLAPP statute required dismissal of libel claim against political blog
6 operator based on operator's refusal to remove statement posted by third-party);
7 *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (explaining that
8 the "exercise of [a publisher's] editorial control and judgment" is protected by the
9 First Amendment); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008 (E.D. Cal.
10 2017) (owner of a website has a "First Amendment right to distribute and facilitate
11 protected speech"); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y.
12 2014) (online publishers have a First Amendment right to distribute others' speech
13 and exercise editorial control on their webpages because "the First Amendment's
14 protections apply whether or not a speaker articulates, or even has, a coherent or
15 precise message, and whether or not the speaker generated the underlying content
16 in the first place"); and, *Snyder v. Phelps*, 532 U.S. 443, 444, 131 S.Ct. 1207,
17 1211, 1215, 179 L.Ed.2d 172 (2011) ("[S]peech on public issues occupies the
18 highest rung of the hierarchy of First Amendment values, and is entitled to special
19 protection" and "A statement's arguably inappropriate or controversial character ...
20 is irrelevant to the question whether it deals with a matter of public concern").
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1 In making representations such as, "These posts, along with a post depicting
2 Lackey's home address and posts of pictures of Lackey and his family, undeniably
3 establish that a reasonable person would interpret the statements as inciting others
4 to inflict physical harm on him" (RAB, 19, citing. 1JA007 ¶14.v., 2JA0127-0139);
5 LACKEY is effectively misrepresenting the facts of this case to this Court. To be
6 clear, neither STARK nor NDOW WATCH have ever posted LACKEY's home
7 address or photos of his family anywhere, either on or offline, and there is
8 absolutely nothing in the record to demonstrate the contrary. Further, the posts
9 referred to on JA 0127-JA 0139, including the posts of photos allegedly depicting
10 LACKEY's family and address, were not only not posted by STARK or NDOW
11 WATCH, but they weren't even posted to the NDOW WATCH Facebook page.
12 See, Vol. II, JA 0127-JA 0139. The posts contained in the record at JA 0127-JA
13 0139 were posted to other Facebook pages, not to the NDOW WATCH page, by
14 unrelated third parties. *Id.* No stretch of the imagination, can find any court in the
15 country that has held an individual liable for an online post, made by a stranger, to
16 a webpage the individual has no ownership, management or control over
17 whatsoever, that has held the individual liable for such post. And quite frankly, for
18 LACKEY to urge this Court to do just that is absurd.

22 STARK also had no involvement in the allegations set forth at RAB, 22
23 asserting,

1 "The communications posted by Stark and NDOW Watch, as well as
2 the posts of others, falsely accuse Lackey of corruption, illegally
3 torturing and killing the bears, and most disturbingly of all, incited
4 and encouraged violence towards Lackey. 1JA0007, 21JA0115-0123,
5 2JA0124-0164, 3JA0165-0187 These posts made by Stark, NDOW
6 Watch, and others cannot as a matter of law involve an issue of public
7 interest. Accusing Lackey of corruption and illegally torturing and
8 killing bears in addition with threatening both violence and murder
9 towards him has absolutely no degree of closeness to Stark's claimed
10 public concern of the preservation and treatment of bears."

11 Again, to be clear, neither STARK nor NDOW WATCH have ever threatened
12 violence or murder against LACKEY and again, the record is completely devoid of
13 any such allegations. While LACKEY goes to great lengths to attribute third-party
14 statements to STARK, doing so does not absolve him of his burden to identify a
15 defamatory statement actually made by STARK, which LACKEY has failed to do.

16 Respondent argues that STARK's affidavit is insufficient to "show that the
17 subject communications are truthful or made without knowledge of their falsehood
18 to justify dismissal" (RAB, 22) because STARK's affidavit only contained "a legal
19 conclusion that all of her posts are true and made without the knowledge of their
20 falsehood." RAB, 23. But LACKEY fails to recognize that STARK's affidavit
21 contained these conclusive statements because LACKEY completely failed to
22 identify even one single statement made by STARK or NDOW WATCH. How can
23 STARK address whether or not she had knowledge of the truth or falsity of a

1 statement at the time it was made when she didn't make the statements in
2 question?

3 **E. NDOW WATCH and the comments set forth therein are without a**
4 **doubt made in direct connection to an issue of public concern.**

5 Again, the analysis is flawed because LACKEY failed to quote or cite any
6 allegedly defamatory conduct made by STARK or NDOW WATCH, which leaves
7 only the comments of unrelated third-parties to use for analysis purposes.

8 Notwithstanding those challenges present herein, one thing is clear: it cannot
9 be disputed that matters relating to animal rights, wildlife advocacy and
10 particularly the treatment of bears, clearly constitute a matter of public concern.
11 See, *Safari Club Int'l v. New Jersey Dep't of Env'tl. Prot.*, 373 N.J. Super. 515, 862
12 A.2d 1152 (App. Div. 2004) (Hunters failed to establish that black bears posed any
13 serious threat to public safety and that hunting on state land was required to
14 combat the threat); *Fund for Animals v. Mainella*, 294 F. Supp. 2d 46 (D.D.C.
15 2003) (Animal advocacy group that brought action against National Park Service
16 and Department of Interior to enjoin state's black bear hunt); *In re Killington, Ltd.*,
17 159 Vt. 206, 616 A.2d 241 (1992) (findings supported conclusion that wetlands
18 contained necessary black bear habitat and such habitat would be destroyed or
19 imperiled by pond construction); *Moore v. Kempthorne*, 464 F. Supp. 2d 519 (E.D.
20 Va. 2006) (Wildlife Service's addition of black bears to final rule governing big
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1 game hunting in National Wildlife Refuge was entitled to notice-and-comment
2 reference).³

3 Further, Respondent is simply mistaken in his assertion that, “These posts
4 made by Stark, NDOW Watch, and others cannot as a matter of law involve an
5 issue of public interest.” RAB, 22. In *Snyder v. Phelps*, 562 U.S. 443, 444 (2011)
6 the United States Supreme Court expressly held, “[S]peech on public issues
7 occupies the highest rung of the hierarchy of First Amendment values, and is
8 entitled to special protection” and “**A statement's arguably inappropriate or**
9 **controversial character ... is irrelevant to the question whether it deals with a**
10 **matter of public concern.**” [Emphasis Added].
11

12
13 In *Snyder*, the United States Supreme Court decided a gold-star father’s suit
14 seeking damages for intentional infliction of emotional distress, defamation, and
15 publicity. *Snyder v. Phelps*, 562 U.S. 443 (2011). Its facts are notorious. The
16 Plaintiff’s son, a marine killed in the line of duty, was to be buried in his family’s
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18 ³ Other courts have also recognized the public’s interest in animal
19 advocacy. See, *Huntingdon Life Sci., v. Stop Huntingdon Animal Cruelty USA*, 129
20 Cal.App.4th 1228, 1246 (2005) (“Animal testing is an area of widespread public
21 concern and controversy, and the viewpoint of animal rights activists contributes to
22 the public debate.”); *Harkins v. Atlanta Humane Soc.*, 273 Ga.App. 489, 490-
23 91 (2005) (statements of animal rights activists about human society were
protected by First Amendment); *Farm Sanctuary, Inc. v. Dep’t of Food &
Agric.*, 63 Cal.App.4th 495, 504 (1998) (ritual slaughter exception to statute
requiring animals be treated humanely involves issue of public concern); *McGill v.
Parker*, 179 A.D.2d 98, 106-07 (1992) (“treatment of carriage horses has been a
matter of public concern and controversy”).

1 hometown. *Id.* Phelps, founder of the Westboro Baptist Church, along with several
2 of his followers, travelled miles to picket the funeral. *Id.* There they displayed
3 signs reading “God Hates the USA/Thank God for 9/11,” “America is Doomed,”
4 “Don't Pray for the USA,” “Thank God for IEDs,” “Thank God for Dead Soldiers,”
5 “Pope in Hell,” “Priests Rape Boys,” “God Hates Fags,” “You're Going to Hell,”
6 and “God Hates You.” *Id.* The Plaintiff's description of the severe emotional toll
7 the defendants' actions had on him led to a substantial trial court judgment in his
8 favor. However, the Fourth Circuit reversed; 580 F.3d 206 (2009); and the United
9 States Supreme Court, affirming, made it clear that 1. the First Amendment has a
10 far reach in protecting speech in this nation and can be raised defensively even
11 against private lawsuits demanding relief in tort; 2. *once speech is determined to*
12 *be protected, a court will not generally thereafter further scrutinize it with*
13 *respect to its content or tone*; and 3. the touchstone which defines protected speech
14 is that it be uttered as to a matter of public concern. [Emphasis Added]. *Id.*

17 In *Snyder*, the Court explicitly rejected the argument that the crude and
18 egregiously offensive messages on the anti-gay protesters' signs—which
19 included “Fag Troops,” “God Hates the USA/Thank God for 9/11” and
20 “Thank God for Dead Soldiers”—should affect the inquiry into whether the
21 signs addressed a matter of public concern. [Emphasis Added]. *Id.* at 454.

1 According to the Court, “[w]hile these messages may fall short of refined social or
2 political commentary, the issues they highlight ... are matters of public import.” *Id.*

3 Here, LACKEY complains of third-party comments that address the
4 treatment of bears. These are issues of public import. As such and just as the Court
5 held in *Snyder*, even if some of the third-parties’ comments were crude and
6 contained violent imagery, “th[is] would not change the fact that the overall thrust
7 and dominant theme of [the comments] spoke to broader public issues.” *See, Id.*

8 Accordingly, Respondent’s arguments that the subject third-party statements
9 identified in the FAC do not constitute matters of public concern is flawed and
10 remains unsupported by relevant precedent.
11

12 **F. LACKEY misapplies the CDA and relevant case law related thereto.**

13 As LACKEY himself admits, “An ‘information content provider’ is
14 someone who is ‘responsible in whole or in part, for the creation or development
15 of” the offending content.” [Emphasis Added]. RAB, 25; citing, 47 U.S.C. §
16 230(f)(3). Here, LACKEY has not identified any defamatory statements or
17 “offending conduct” that was created or developed by STARK or NDOW
18 WATCH. To the contrary, LACKEY continues to attempt to hold STARK liable
19 for statements of unrelated third parties on NDOW WATCH public Facebook
20 pages simply because STARK is an administrator thereof, which is the exact
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1 involvement that is expressly protected by the Communications Decency Act
2 (“CDA”).

3 “Section 230 immunity should be broadly construed.” *Universal*
4 *Comm’n. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007); *accord Jane*
5 *Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) (“There has been
6 near-universal agreement that section 230 should not be construed grudgingly.”).
7 “Congress enacted [the CDA] partially in response to court cases that held internet
8 publishers liable for defamatory statements posted by third parties on message
9 boards maintained by the publishers.” *Jane Doe No. 1*, 817 F.3d at 18. The statute
10 was intended to prevent tort liability from “chilling” online speech and to:
11

12 “remov[e] the disincentives to self-regulation that would otherwise
13 result if liability were imposed on intermediaries that took an active
14 role in screening content”—for example, by filtering or editing out
15 obscene or otherwise inappropriate content. *Zeran v. America Online,*
16 *Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). To give effect to those
17 purposes, § 230 “shields website operators from being ‘treated as the
18 publisher or speaker’ of material posted by users of the site, 47 U.S.C.
19 § 230(c)(1), which means that ‘lawsuits seeking to hold a service
20 provider liable for its exercise of a publisher’s traditional editorial
21 functions—such as deciding whether to publish, withdraw, postpone
22 or alter content—are barred.’”

23 (Citations Omitted). *Ayyadurai v. Floor64, Inc.*, 270 F. Supp. 3d 343 (D. Mass.
2017).

24 The CDA, however, does not immunize an interactive computer service if it
25 also functions as an information content provider **for the portion of the statement**

1 or publication at issue. [Emphasis Added]. See, *Carafano v. Metrosplash.com,*
2 *Inc.*, 339 F.3d 1119, 1123-25 (9th Cir. 2003) (finding 47 USC 230(c)(I) would bar
3 plaintiff's claims unless defendant "created or developed the particular
4 information at issue"). [Emphasis Added]. Here, while STARK and NDOW
5 WATCH are able to post on their own behalf and do from time to time,
6 Respondent has not identified any specific statements actually authored by STARK
7 or NDOW WATCH that are allegedly defamatory.

9 Here, it appears the District Court agreed as it ultimately concluded that,
10 "Given the nature of Facebook, the Court cannot conclude for the purposes of a
11 motion to dismiss that STARK did not encourage the third party users'
12 statements. Therefore, at this time, *the Court cannot find STARK is immunized*
13 *from liability for the third party comments under the CDA.*" [Emphasis Added].
14 Vol. IV, at JA 0293. However, this holding by the District Court was clear error. If
15 the CDA excluded from immunity websites that "encouraged" negative or
16 potentially defamatory statements, then websites like Yelp and other review
17 websites that elicit reviews- both positive and negative- would otherwise be
18 exempt from CDA immunity, which is clearly not the case. See, *Kimzey v. Yelp!*
19 *Inc.*, 836 F.3d 1263 (9th Cir. 2016); *Reit v. Yelp!, Inc.*, 29 Misc. 3d 713, 907
20 N.Y.S.2d 411 (Sup. Ct. 2010).
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23

1 There are no allegations set forth in the FAC that allege that STARK or
2 NDOW WATCH “authored or created” any of the content of the allegedly
3 defamatory statements identified therein. As such, the District Court erred in
4 finding that STARK was not protected by CDA immunity.

5
6 **G. Respondent’s claims cannot survive under the shield that Nevada is a
notice-pleading State.**

7 Under Nevada law, to state a claim for defamation a plaintiff must
8 demonstrate “(1) a false and defamatory statement of fact by the defendant
9 concerning the plaintiff; (2) an unprivileged publication to a third person; (3)
10 fault, amounting to at least negligence; and (4) actual or presumed damages.”
11 [Emphasis Added]. *Pope v. Motel 6*, 114 P.3d 277, 282 (Nev. 2005). Again,
12 LACKEY’s fatal flaw herein is that he has not and cannot identify one single false
13 and defamatory statement of fact made by STARK or NDOW WATCH concerning
14 Respondent. None have been identified and STARK maintains that none exist. It
15 is LACKEY’s burden to specifically identify the defamatory statement of fact
16 made by STARK concerning LACKEY and no such statement(s) have been
17 identified.
18
19

20 Instead, in support of his defamation claim, LACKEY argues,

21 The allegations set forth in the FAC plead a cognizable claim for
22 defamation: (1) Stark does business as NDOW Watch and therefore
23 Stark and NDOW Watch are one and the same, 1JA0012; (2) Stark
and others have made and continue "to make false statements

1 regarding Carl Lackey's character in a vicious and calculated effort to
2 damage his reputation and jeopardize his employment[.]" 1JA0013-
3 0019; (3) Stark encourages others "to shame and harass Lackey so that
4 he will lose his job and/or feel threatened enough to leave the
5 community," 1JA0013; (4) Stark and others "acted intentionally and
6 with malice with the primary purpose being to harm, threaten,
7 intimidate, cause fear, anxiety, embarrassment and damage to
8 [Lackey's] reputation by publishing false and vicious comments
9 accusing [him] of criminal conduct (including accepting bribes and
10 conspiracy), designed to incite public outrage[.]" 1JA0014-0019; (5)
11 Lackey "is either a limited purpose figure or a private individual thrust
12 into an area of public concern[.]" 1JA0018; (6) Stark "published and
13 encouraged the statements despite having actual knowledge that such
14 statements were false, or with reckless disregard for their veracity, id.;
15 (7) Stark and others "knew that the inflammatory false information
16 they were posting was malicious, false, and accusatory of criminal
17 conduct and had the purpose of harming, threatening, intimidating
18 and/or harassing [Lackey] and his livelihood[.]" id.; and (8) Lackey
19 suffered damages as a result, id.

20 RAB. 29-30. Respondent goes on to argue that Nevada is a notice pleading
21 jurisdiction and as such, the rules do "not require Lackey to set forth every fact
22 that supports his claims for relief." RAB, 31. However, the rules do require
23 LACKEY to set forth enough allegations to satisfy each elements of the cause of
action being asserted which, with respect to defamation, is "a false and
defamatory statement of fact by the defendant concerning the plaintiff," which
LACKEY has failed to identify herein. See, *Hay v. Hay*, 100 Nev. 196, 678 P.2d
672 (1984), (a claim for defamation need only set forth sufficient facts to
establish all the necessary elements of a claim for relief). LACKEY has failed to
set forth any specific defamatory statements made by STARK or NDOW

1 WATCH concerning Respondent and as such, his cause of action for defamation
2 must be dismissed.

3 **H. The District Court erred in failing to dismiss the other causes of**
4 **action asserted against STARK arising out of the protected**
5 **activities.**

6 A special motion to strike may be used to strike any “cause of action against
7 a person arising from any act of that person in furtherance of the person’s right of
8 petition or free speech . . .” (Citations Omitted). [Emphasis Added]. See, *Baral v.*
9 *Schnitt*, 376 P.3d 604 (2016). The District Court abused its discretion in failing to
10 dismiss the remaining claims for Intentional Infliction of Emotional Distress and
11 Civil Conspiracy, as both claims arise directly out of STARK’s protected activities
12 as described more fully herein.

13
14 Respondent appears to argue that because STARK acts as an administrator
15 of the public Facebook page, NDOW WATCH, that somehow automatically
16 magically renders STARK liable for the conduct of every single member, follower
17 or supporter of the page. Of course, there is no such law or precedent which would
18 support such broad “guilt by association” type of accusations.

19
20 In any event, even taking the allegations set forth in the FAC as true, all of
21 the claims set forth therein appear to arise out of STARK’s constitutional rights to
22 free speech, petitioning and association. There is not one single statement
23 identified in the FAC made by STARK or NDOW WATCH. See, Vol. I, JA 0011-

1 JA 0021. There isn't even an allegation in the FAC that STARK even knows the
2 individuals who actually made the allegedly defamatory statements set forth in the
3 FAC. *Id.*

4 As to LACKEY's Intentional Infliction of Emotional Distress claim and as
5 set forth more fully herein, LACKEY has failed to demonstrate any examples of
6 defamatory statements made by STARK or NDOW WATCH and further,
7 LACKEY has failed to identify any conduct on the part of STARK or NDOW
8 WATCH which constitutes conduct that was extreme and outrageous. Without
9 identifying actual conduct or statements attributable to STARK and/or NDOW
10 WATCH, LACKEY cannot maintain a claim for Intentional Infliction of
11 Emotional Distress. See, *Star v. Rabello*, 97 Nev. 124, 625 P.2d 90 (1981) (A
12 prima facie case of intentional infliction of emotional distress requires, among
13 other elements, that the defendant's conduct was extreme and outrageous with
14 either reckless disregard or intent to cause the emotional distress.)
15

16 STARK submitted evidence that she has "never harassed or threatened Carl
17 Lackey, nor [has she] attempted to cause him fear, anxiety, embarrassment or tried
18 to damage the reputation that he has." Vol. I, JA 0078, ¶10. Further, LACKEY has
19 failed to present any evidence whatsoever or even allege how or what STARK has
20 done to initiate or encourage public comment that would constitute actionable
21 conduct. See generally, Vol. I, JA 0011-JA 0021. As such, for the Court to find
22
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1 that STARK can be liable for a bare and general assertion that STARK and/or
2 NDOW WATCH has engaged in certain conduct is wholly unsupported.

3 As to LACKEY's Civil Conspiracy claim, LACKEY has not even alleged
4 all of the elements necessary to sustain a claim for civil conspiracy. See, *Consol.*
5 *Generator-Nevada v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251,
6 1256 (1998) (Actionable civil conspiracy "consists of a combination of two or
7 more persons who, by some concerted action, intend to accomplish an unlawful
8 objective for the purpose of harming another, and damage results from the act or
9 acts.")
10

11 LACKEY has failed to in any way specify how STARK and/or NDOW
12 WATCH has allegedly acted in concert with the other defendants, or anyone else
13 for that matter, to accomplish the goals of harassing and threatening LACKEY, or
14 any unlawful objective or damages, as required to sustain a civil conspiracy claim.
15 *Id.*; Vol. I, JA 0011-JA 0021. Further, STARK declared under penalty of perjury
16 that she has "never acted in concert with any other Defendant in the case to harass
17 or threaten CARL LACKEY." Vol. I, JA 0078, ¶9.
18

19 Specifically, in the anti-SLAPP context, in *Contreras v. Dowling*, the Court
20 found that "an anti-SLAPP motion is an evidentiary motion." (Citations Omitted).
21 5 Cal. App. 5th 394, 416, 208 Cal. Rptr. 3d 707, 724 (Ct. App. 2016), *as modified*
22 *on denial of reh'g* (Nov. 18, 2016), *review denied* (Feb. 1, 2017). Just as is the case
23

1 here, the *Contreras* Court found plaintiff, Contreras, failed to provide any
2 evidentiary support for her allegations of conspiracy...” *Id.* The Court ultimately
3 held, “Because civil conspiracy is so easy to allege, plaintiffs have a weighty
4 burden to prove it;” the plaintiff failed to meet their burden by failing to produce
5 any evidence to support her allegations of conspiracy. *Id.*

7 Any sort of “guilt by association” which Respondent somehow attempts to
8 impute to STARK by way of her similar advocacy efforts as those of the third-
9 party comments at issue herein, directly arises out of STARK’s Constitutional
10 rights to speech, petition and associate. As such, even if such conduct had been
11 properly plead, it would be protected as it arises out of protected activities under
12 the Anti-SLAPP statute. Accordingly, the District Court erred in failing to dismiss
13 LACKEY’s claims for Intentional Infliction of Emotional Distress and civil
14 conspiracy as to STARK.
15

16 VI. 17 CONCLUSION

18 This is a text-book SLAPP lawsuit. Here, LACKEY seeks to hold STARK
19 liable for posts made by unrelated third parties to a public Facebook page, NDOW
20 WATCH, which STARK acts as an administrator for. LACKEY has not identified
21 a single quote or citation reflecting any comments made by STARK. Upon
22 information and belief, LACKEY has not sued the actual third parties who made
23

1 the comments. It is abundantly clear that LACKEY has brought this suit against
2 STARK to bully and intimidate STARK into removing her wildlife advocacy
3 Facebook page because LACKEY simply doesn't like the viewpoint it presents.

4 The ripple effect of SLAPP suits, particularly in our current web-based
5 society is enormous. Persons, like STARK, who have been outspoken on issues of
6 public importance who are then targeted in such suits will often choose to stay
7 silent in the future in fear of being hauled into court on the sole basis that person
8 exercised their First Amendment rights in connection with an important public
9 issue or advocacy efforts like STARK's. "Short of a gun to the head, a greater
10 threat to First Amendment expression can scarcely be imagined." 123 Am. Jur.
11 Proof of Facts 3d 341 (2011), Citing, *Gordon v. Marrone*, 155 Misc. 2d 726, 590
12 N.Y.S.2d 649 (Sup 1992), aff'd, 202 A.D.2d 104, 616 N.Y.S.2d 98 (2d Dep't
13 1994). This is exactly what LACKEY seeks to accomplish by way of this lawsuit
14 and exactly what the Nevada Anti-SLAPP statute explicitly aims to prevent.
15
16

17 Further, acting as the administrator of a public web page is similarly the
18 exact type of conduct that is immunized by the Federal Communications Decency
19 Act.
20

21 Based on the foregoing, Appellant, STARK, respectfully asks this Court to
22 reverse the District Court, dismissing LACKEY's FAC as to STARK; and, to
23 remand with instructions to award reasonable costs and attorney's fees and

1 additional damages in an amount up to \$10,000 each to STARK and NDOW
2 WATCH pursuant to NRS 41.670.

3 Dated this 15th day of June, 2018.

4 

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VII.
ATTORNEY'S CERTIFICATE

1
2
3 1. I hereby certify that this brief complies with the formatting
4 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and
5 the type style requirements of NRAP 32(a)(6) because:

6 ☒ This brief has been prepared in a proportionally spaced typeface
7 using Microsoft Word in Times New Roman, size 14 font; or

8 ☐ This brief has been prepared in a monospaced typeface using *[state name*
9 *and version of word processing program]* with *[state number of characters per*
10 *inch and name of type style]*.

11
12 2. I further certify that this brief complies with the page-or type-volume
13 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
14 NRCP 32(a)(7)(C), it is either:

15 ☒ Proportionately spaced, has a typeface of 14 points or more and contains
16 5,712 total words; or,
17

18 ☐ Monospaced, has 10.5 or fewer characters per inch, and contains ____
19 words or ____ lines of text; or


20 ☐ Does not exceed ____ pages.

21 3. Finally, I hereby certify that I have read this appellate brief, and to the
22 best of my knowledge, information, and belief, it is not frivolous or interposed for
23

1 any improper purpose. I further certify that this brief complies with all applicable
2 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires
3 every assertion in the brief regarding matters in the record to be supported by a
4 reference to the page and volume number, if any, of the transcript or appendix
5 where the matter relied on is to be found.
6

7 I understand that I may be subject to sanctions in the event that the
8 accompanying brief is not in conformity with the requirements of the Nevada
9 Rules of Appellate Procedure.

10 Dated this 15th day of June, 2018.

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**VIII.
PROOF OF SERVICE**

I hereby certify pursuant to NRAP 25(c), that on the ____ day of June, 2018, I caused service of a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF** on all parties to this action by the method(s) indicated below:

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